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IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1984

CLINTON P. CARON, PETITIONER

VS.

BANGOR PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF MAINE

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QUESTIONS PRESENTED

1. Whether and to what extent under state and federal constitutional law consistent with the guarantee of freedom of the press in the First Amendment to the United States Constitution as embodied in the Fourteenth Amendment, a libel action by a public official against a newspaper, brought in a state court may be predicated upon alleged statements of opinion.

2. Whether there are genuine issues of material facts demonstrating that a newspaper's motion for summary judgment should not have been granted and upheld by state courts.

3. Whether Maine state courts fully, fairly and accurately considered and decided the question of whether allegedly defamatory statements appearing in a certain newspaper editorial constitute statements of fact or statements of opinion and were compelled to so decide such question solely upon the basis of federal constitutional law.

4. Whether petitioner should have been permitted and has the right to inquire into the editorial processes and state of mind of those persons responsible for the allegedly defamatory publication.

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IN THE SUPREME COURT OF THE UNITED STATES

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NO.

CLINTON P. CARON, PETITIONER

VS.

BANGOR PUBLISHING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MAINE

A writ of certiorari is respectfully sought to review the final judgment of the Supreme Judicial Court of Maine in this case.

OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine (Appendix, infra, pp. 20-32) is reported in 470 A. 2d 782. The opinion of the Kennebec County Superior Court, granting the Defendant's motion for summary judgment (Appendix, infra, pp. 33-54) is unreported.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on January 17, 1984 (Appendix, infra, pp. 20-32). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) because a title, right, privilege or immunity was claimed under the Constitution, statutes of or authority exercised under the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

2. Rule 56(c) (Summary Judgment) of the Maine Rules of Civil Procedure provides in relevant part:

Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

STATEMENT OF THE CASE

This case originated upon the filing of a complaint (Appendix, infra, pp. 58-73) in the Kennebec County Superior Court by the petitioner, Clinton P. Caron, against the Bangor Publishing Company which alleged that on or about August 28, 1982, the Bangor Publishing Company composed and published a defamatory writing concerning petitioner. This writing (Appendix, infra, pp. 69-72) was printed on an editorial page of the newspaper and contained a headline entitled, "Obesity in the ranks". In addition, it

contained the following statements among others:

Fat, though a perfectly pointed and clear adjective, is becoming rare in common usage, except to characterize those whose moral depravity can be overlooked only by those of the bench.

We get into all of this by way of editorial writer's frustration. For years, we have yearned to address the topic of overweight policemen-- fat cops, if you will.

A policeman is expected, not only to wear a uniform with pride, but to be able to run at least as fast as a felon, who is invariably nimble of foot and as lean as Bill Rogers.

In Waterville, as with so many other municipal police departments, there is a city cop, a sergeant no less, who makes Jackie Gleason look di-

minutive. He appears, in all his rotundity, in an Associated Press photo of the Waterville street slaying.

He may be the most dedicated cop in Maine. He may know his stuff. He is in all probability somebody's loved one. But by any reasonable standard he carries too much mass to be either an effective cop on the beat or a tribute to his uniform.

In its answer to the petitioner's complaint (Appendix, infra, pp. 74-79), the Bangor Publishing Company asserted that all of these and other statements are protected under the First Amendment to the Constitution of the United States. The Company further admitted that the photo (Appendix, infra, p. 73) referred to in the article in question appeared in its newspaper in the August 25, 1982 edition.

The newspaper filed a motion for summary judgment on May 19, 1983 which motion was heard in the Kennebec County Superior Court before Justice Donald Alexander on June 24, 1983. On June 17, 1983, petitioner had filed a notice to take the deposition of the author of the editorial in question, V. Paul Reynolds, and stated the same in his Affidavit dated June 13, 1983 (Appendix, infra, pp. 135-139)). After this hearing on the said motion, Justice Alexander then and there ordered that this motion for summary judgment be granted (Appendix, infra, pp. 33-54, p. 55).

Petitioner seasonably appealed from this order granting summary judgment. On January 17, 1984, the Supreme Judicial Court of Maine affirmed the granting of this motion for summary judgment (Appendix, infra, pp. 20-32).

The federal and constitutional questions sought to be reviewed here were raised in the court of first instance (the Kennebec

County Superior Court) on May 19, 1983 by the respondent newspaper's said motion for summary judgment. The newspaper asserted two grounds in support of its said motion. First, it alleged that petitioner cannot prove as a matter of law that it acted with "actual malice" under the standard announced in New York Times v. Sullivan, 376 U.S. 254 (1964). Second, it stated that the editorial in question represents a pure statement of opinion and cannot as a matter of First Amendment Constitutional law be determined defamatory.

The presiding Justice of the Superior Court focused only upon this second ground in granting summary judgment (Appendix, infra, pp. 33-54). The Supreme Judicial Court of Maine also focused solely upon this second ground in affirming summary judgment (Appendix, infra, pp. 20-32). The Supreme Judicial Court of Maine further explicitly relied upon this Court's decision in

Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974) (Appendix, infra, p. 27) and decided that the allegedly defamatory statements cannot be construed as statements of fact (Appendix, infra, p. 31). This Court further held that the editorial in question is an expression of opinion based on disclosed nondefamatory facts and could not reasonably be construed to imply undisclosed defamatory facts.

REASONS FOR GRANTING THE PETITION

Petitioner submits (1) that in this case the Maine Supreme Judicial Court has decided federal constitutional questions of great importance and substance not heretofore specifically determined by this Court, or in the alternative, (2) that the Maine Supreme Judicial Court has decided those questions in a way which is not in accord with applicable decisions of this Court.

The basic questions in this case would not seem to have ever come before this Court.

Prior cases before this Court which come closest to presenting questions similar to those in this case would seem to be Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) and National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974). The central issue in Gertz, however, was whether a private individual had the same burden of proof concerning a suit against a media defendant as did a public official. Greenbelt and National Association of Letter Carriers, furthermore, involved statements made during a public city council meeting and debate and statements in a labor union newsletter, respectively. No decision by this Court delineates whether and to what extent a libel action may be predicated upon a statement of opinion.

Are statements contained in a newspaper editorial about police officers in general to the effect that petitioner is an in-

effective police officer and not a tribute to his uniform different from statements made in the heat of a public debate and labor disputes? For purposes of the United States Constitution, petitioner believes so. Respondent newspaper has argued there is no such distinction and that the allegedly defamatory statements are absolutely privileged and protected under the First Amendment to the United States and Maine Constitutions.

The presiding justice of the Kennebec County Superior Court simply stated that "I think it's a matter of opinion" (Appendix, infra, p. 54) and did not and would not (Appendix, infra, pp. 56-57) describe the precise basis for his ruling. The Maine Supreme Judicial Court, however, explicitly relied in part upon Gertz, supra and apparently adopted the standards and principles embodied in the Restatement (Second) of Torts §566 (1977). The highest state court in Maine, therefore, has apparently rendered a decision

on summary judgment because it believed that federal law compelled it to do so.

Does federal law of libel and this Court's dictum in Gertz, supra at 339-40, completely preempt state law of libel and the common law qualified privilege of fair comment? Petitioner submits that they do not and that this is part of the true legacy of Gertz. This question is of great importance to both state and federal courts if only because a question of states' rights and the public interest in protecting reputation is involved. If state law of libel and the common law qualified privilege of fair comment are not preempted, then states are free to determine what standards and principles apply concerning alleged defamatory statements of fact or opinion. See, also, New York Times Co. v. Sullivan, 376 U.S. 254, 292 n. 30 (1964).

The pretrial discovery rules of civil procedure intend liberal discovery to en-

able parties to obtain the fullest possible knowledge of the facts before trial. Such discovery is a fundamental right. See, Herbert v. Lando, 441 U.S. 153, 160 (1979); Marchiondo v. Brown, 649 P. 2d 462, 465 (N.M. 1982). In this case, respondent newspaper moved for summary judgment before the author of the allegedly defamatory writing could be deposed as previously scheduled (Appendix, infra, pp. 133-134, 138).

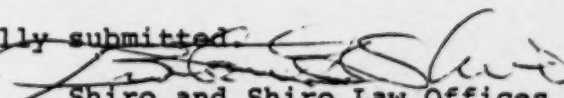
The presiding justice of the Kennebec County Superior Court did not order a continuance or depositions to be taken; he thus denied petitioner the opportunity to discover the author's state of mind and intentions and the respondent's editorial practices and policies. Such discovery at the very least had the potential to generate genuine issues of material facts concerning whether the allegedly defamatory statements represent facts or opinions. The statement of the author is not binding and conclusive. See, St. Amant v. Thompson, 390 U.S. 727

(1968); Melton v. Bow, 243 S.E. 2d 590 (Ga.),
cert. denied 439 U.S. 985. The author's
answers to petitioner's written interroga-
tories, however, at the very least generate
issues of material facts concerning whether
or not statements of fact or opinion were
expressed by him. (Appendix, infra, pp. 80-
132). The decision of the Maine Supreme
Judicial Court thus is in direct conflict
with at least one decision of this Court
concerning the issue of discovery.

CONCLUSION

The petition for a writ of certiorari
should be granted.

Respectfully submitted,


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April , 1984

APPENDIX

Here are set forth successively, the opinion of the Supreme Judicial Court of Maine; opinion of the Kennebec County Superior Court and transcript of the hearing on motion for summary judgment; order of the Kennebec County Superior Court on motion for summary judgment; order of the Kennebec County Superior Court on respondent's motion for findings of fact and conclusions of law; Petitioner's Complaint and Exhibits A and B; Respondent's Affirmative Defenses and Answer; Respondent's Answers to Plaintiff's Interrogatories; Petitioner's Notice to Take Oral Discovery Deposition of V. Paul Reynolds; Affidavit of Petitioner.

v.

BANGOR PUBLISHING COMPANY.

Supreme Judicial Court of Maine.

Argued Nov. 18, 1983.

Decided Jan. 17, 1984.

Police officer brought action against newspaper to recover for defamation. The Superior Court, Kennebec County, granted newspaper's motion for summary judgment and police officer appealed. The Supreme Judicial Court, Scolnik, J., held that editorial which stated that police officers should be in good physical condition but that plaintiff police officer was overweight was a statement of opinion, rather than a statement of fact, and thus was not actionable.

Affirmed.

1. Judgment 185. 1 (3)

Affidavits offered by author of editorial and publisher of newspaper, reciting that they were based on affiants' own knowledge, information, and belief, were properly

considered in support of motion for summary judgment in defamation action as each affiant had personal knowledge of his own activities and thought processes with respect to allegedly defamatory editorial.

2. Libel and Slander 54

Essential element of libel is that publication in question contain false statement of fact.

3. Libel and Slander 6 (1)

Newspaper editorial, if statement of opinion, is not actionable.

4. Libel and Slander 123 (2)

Determination of whether allegedly defamatory statement is statement of fact or opinion is a question of law.

CARON v. BANGOR PUB. CO. Me. 783
Cite as 470 A 2d 782 (Me. 1984)

5. Libel and Slander 123 (2)

If average reader could reasonably understand statement in newspaper editorial as either fact or opinion, question of which it is, and thus whether it is actionable, will

be submitted to jury.

6. Libel and Slander 6 (1)

Statement, ostensibly in form of opinion, gives rise to defamation liability if it implies the allegation of undisclosed defamatory facts as the basis of opinion.

7. Libel and Slander 6 (1)

Comment ostensibly in the form of statement of fact is an opinion, and not actionable, if it is clear from surrounding circumstances that maker of statement did not intend to state objective fact, rather, intended to make personal observation on the facts.

8. Libel and Slander 10 (1)

Newspaper editorial which stated that policemen should be able to run at least as fast as felons, which stated that there was one person in the department "who makes Jackie Gleason look diminutive." which stated that that person "in all his rotundity" appeared in photograph taken at scene of

homicide, which stated that physical conditioning should be condition of employment for police officers, and which stated that policeman in question carried "too much mass" to be effective was statement of opinion, not of fact, and thus was not actionable.

Louis J. Shiro (orally), Burton G. Shiro Law Offices, Waterville, for plaintiff.

Eaton, Peabody, Bradford & Veague, P.A., Bernard J. Kubetz (orally), Bangor, for defendant.

Before McKUSICK, C.J. and NICHOLS, ROBERTS, VIOLETTE, GLASSMAN and SCOLNIK, JJ. SCOLNIK, Justice.

The Plaintiff, Clinton Caron, appeals from a summary judgment of the Superior Court (Kennebec County) for the defendant, Bangor Publishing Company, publisher of the Bangor Daily News. The plaintiff maintains that it was error to conclude that the allegedly defamatory material published by the defendant was a statement of opinion and therefore not

actionable. He also argues that the affidavits submitted by the defendant in support of its motion for summary judgment were defective. We deny the appeal and affirm the judgment.

The plaintiff, a veteran Waterville police sergeant, was included in an Associated Press photograph of a Waterville murder scene published in the Bangor Daily News on August 25, 1982. Three days later, the Bangor Daily News published an editorial entitled "Obesity in the Ranks," which provided in pertinent part:

For years we have yearned to address the topic of overweight policemen - fat cops, if you will. We've resisted this as an issue, though. We did not want to appear either trivial or insensitive. Some people, according to recent research, can not help extreme overweight.

But cops can. As a rule, police departments do not hire unfit rookies. The girth comes with time. There is after all, a military dimension to law enforcement.

a policeman is expected, not only to wear a uniform with pride, but to be able to run at least as fast as a felon, who is invariably nimble of foot and as lean as Bill Rogers.

In Waterville, as with so many other municipal police departments, there is a city cop, a sergeant no less, who makes Jackie Gleason look diminutive. He appears, in all his rotundity in an Associated Press photo of the Waterville street slaying.

He may be the most dedicated cop in Maine. He may know his stuff. He is in all probability somebody's loved one. But by any reasonable standard he carries too much mass to be either an effective cop on the beat or a tribute to his uniform. In short, physical conditioning is, or should be, a condition of employment for those responsible for public safety and law and order. Thereafter, the plaintiff commenced this

defamation action. The defendant moved for summary judgment, and in support of its motion, presented affidavits from V. Paul Reynolds, the author of the editorial, and Richard K. Warren, the publisher of the newspaper.

(1) Each affidavit offered by defendant recites that it was based on the affiant's own knowledge, information and belief. In Dineen v. Star Press, Inc., 391 A. 2d 834, 835 (Me. 1978), we stated that:

Affidavits in support of a motion for summary judgment that are solely based upon information and belief are insufficient. M.R.Civ. P. 56 (e); 2 Field, McKusick & Wroth, Maine Civil Practice 2d, § 56.5. Affidavits made according to information and belief may be considered, however, if the affidavit otherwise shows that it was made from personal knowledge. Steeves v. Irwin, Me., 233 A. 2d 126, 130 (1967); Field, McKusick & Wroth supra.

It is apparent that each affiant had personal knowledge of his own activities and thought

processes with respect to the editorial in question. The presiding justice, therefore, properly considered the affidavits presented by the defendant in support of its motion for summary judgment. We next consider the merits of the motion.

(2,3) An essential element of libel is that the publication in question must contain a false statement of fact. This requirement has its roots in the United States Constitution. Its rationale is stated in Gertz v. Robert Welsh, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed. 2d 789 (1974):

Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Id at 339-40, 94 S. Ct. at 3007. Thus, if the Bangor Daily News editorial is a statement of opinion, it is not actionable.

(4,5) The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law. See Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P. 2d 425 (1976); Pease v. Telegraph Publishing Co., Inc. 121 N.H. 62, 426 A 2d 463 (1981); Rinaldi v. Holt, Rinehart & Winston, Inc., 397 N.Y.S. 2d 943, 42 N.Y. 2d 369, 366 N.E.2d 1299, cert. denied, 434 U.S. 969, 98 S. Ct. 514, 54 L. Ed. 2d 456 (1977); Cole v. Westinghouse Broadcasting Co., Inc. 386 Mass. 303, 435 N.E. 2d 1021 (1982). If the average reader could reasonably understand the statement as either fact or opinion, the question of which it is will be submitted to the jury. E. g., Good Government Group v. Superior Court, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P. 2d 572 (1978), cert denied, 441 U. S. 961, 99 S. Ct. 2406, 60 L.Ed 2d 1066 (1979); Pease v. Telegraph Publishing Co., Inc., supra; Myers v. Boston Magazine Co., Inc., 380 Mass. 336, 403 N.E.2d 376 (1980).

If, however, the court concludes that the average reader could not reasonably understand the statement as anything other than opinion, no genuine issue of material fact exists and summary judgment for the defendant in the libel action may be entered. Such is the situation here.

(6,7) A statement, ostensibly in the form of an opinion, gives rise to liability if it implies the allegation of undisclosed defamatory facts as the basis of the opinion. See Restatement (Second) of Torts § 566 (1977). On the other hand, a comment, ostensibly in the form of a statement of fact, is an opinion if it is clear from the surrounding circumstances that the maker of the statement did not intend to state an objective fact but intended rather to make a personal observation on the facts. E.g., National Association of Letter Carriers v. Austin, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed. 2d 745 (1974) (the statement that the plaintiff was a "scab", as pejoratively defined by novelist Jack London, was not

libelous, based on all circumstances);

Greenbelt Cooperative Publishing Assoc. v.

Bresler, 398 U.S. 6, 90 S. Ct. 1537, 26

L.Ed 2d 6 (1970) (the statement that the plaintiff was engaged in "blackmail" was not libelous based on all the circumstances).

The distinction between statements of fact and statements of opinion is well stated

in Mashburn v. Collins, 355 So. 2d 879,

885 (La. 1977):

(T)he crucial difference between statement of fact and opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing fact.

See also Goodrich v. Waterbury Republican-American, Inc., 188 Conn. 107, 448 a 2d

1317 (1982); Marchiondo v. Brown, 98 N.M.

394, 649 P. 2d 462 (1982); Nevada Independent Broadcasting Corp. V. Allen, Nev. 664 P. 2d

337 (1983). Thus, the question before the motion justice was whether an ordinary reader

of the editorial "Obesity in the Ranks" would understand the statement that the plaintiff was not "an effective cop on the beat or a tribute to his uniform" as a statement of objective fact or a subjective opinion based on nondefamatory facts.

(8) We conclude that the allegedly libelous statements contained in the editorial cannot reasonably be construed as a statement of objective fact. This is not a case where the defendant stated, without more, that the plaintiff was not "either an effective cop on the beat or a tribute to his uniform." Rather, the editorial clearly discloses the facts upon which the above-quoted passage is based, namely, that the plaintiff is overweight. The editorial expresses the opinion that police officers should be physically fit and that the plaintiff's weight, as depicted in the Associated Press photograph, rendered him physically unfit. Although the plaintiff may be dedicated, knowledgeable, and loved, the author of the

editorial opines that "he carries too much mass to be either an effective cop on the beat or a tribute to his uniform." A reader of the entire editorial could not reasonably think that anything other than the plaintiff's weight formed the basis for this opinion. A reader may not accept the view of the Bangor Daily News that an overweight police officer is ineffective or one who cannot be a tribute to his uniform, but he at least understands the basis for the opinion. He is free to agree or disagree.

Because the editorial is an expression of opinion based on disclosed nondefamatory facts, and cannot reasonably be construed to imply undisclosed defamatory facts, the Superior Court properly granted the defendant's motion for summary judgment.

The entry is:

Judgment affirmed.

All concurring.

STATE OF MAINE

KENNEBEC, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-82-581

CLINTON P. CARON,
PLAINTIFF

VS.

BANGOR PUBLISHING CO.,
DEFENDANT

TRANSCRIPT OF HEARING ON
MOTION FOR SUMMARY JUDGMENT

JUNE 24, 1983

THE COURT: The next matter before the Court is Clinton Caron v. Bangor Publishing Company.

MR. KUBETZ: This case has been extensively briefed.

THE COURT: I have reviewed the file.

MR. KUBETZ: Has our supplemental memoranda which has been filed in the last two weeks come in?

THE COURT: It came in yesterday.

MR. KUBETZ: Briefly, Your Honor, this is a libel action in which the plaintiff seeks, I believe, in excess of three million dollars in damages as a result of an editorial published in the Bangor Daily News describing him as a fat cop who is not competent physically to carry out the duties of his office. Under the Law Court's decision in Rouche v. Egan it's undisputed that Mr. Caron is a public official and the--

THE COURT: Basically the press has an open season on cops is your position?

MR. KUBETZ: No.

THE COURT: How don't they have an open season?

MR. KUBETZ: Unless they publish a factual statement with knowledge that it's false or entertain just doubt as to its truth or falsity--it's a subjective standard that the Law Court applies to what was in the author's or publisher's mind at the time of publishing. It's not, as the plaintiff suggests, a question of whether an investigation

should or should not have been done if the author and/or the publisher did not have facts suggesting that the article was false and they entertained no serious legitimate doubts that a factual article is false there could be no liability. In this case we have the additional factor which we are talking about, an editorial, which contains a great deal of metaphors.

THE COURT: So you take shots in editorials and that's okay?

MR. KUBETZ: The decision in Gertz v. Welch and other cases which we cited in our brief basically supports the proposition that the expression of opinion, the expression of ideas, and in this case the need for police officers to be physically fit allows the media--

THE COURT: The plaintiff says that this was a personal attack on the police officer.

MR. KUBETZ: The affidavits that are in evidence clearly state that neither the author nor the publisher knew the plaintiff at the time the editorial was written. The only basis upon which the plaintiff was singled out and not singled out by name but only singled out by reference with regards to a wire service photograph which was disseminated of the plaintiff approximately three to five days before this publication. That was the only basis upon which he was

referred to. And the article, in fact, refers to a photograph, an Associated Press photograph, which appeared several days

previously and depicted an overweight Waterville Police Officer. There is no mention of the plaintiff's name in the editorial, and, in fact, it's fact. Neither the author nor the editor had any knowledge of the plaintiff that the person depicted in the photograph was a police officer or the person being referred to in the editorial was the plaintiff. It's our position that to do that, to allow the case to proceed in those circumstances would basically allow the plaintiff to conduct a fishing expedition which he's going to gain nothing. Again, it's not an objective standard as the plaintiff would suggest. It's a subjective standard; did the author entertain serious doubts, and the evidence before the Court is clearly no. To allow the litigation to continue would impose with what the

courts have referred to as a chilling effect upon the media's first amendment rights. For those reasons and those reasons expressed by this Court in the Maine Yankee case several months ago in which the Court explored the actual malice standard and the breathing space necessary for the media to allow the media to perform its watchdog function over public officials, we feel the motion for summary judgment should be granted at this stage.

THE COURT: Any response? What is the libel here?

MR. SHIRO: Well, we'll focus on the paragraph that appears in the second column beginning with these words, "He may be the most dedicated cop in Maine. He may know his

stuff. He is in all probability somebody lovely, but by any reasonable standard he carries too much mass to be either an effective cop on the beat or a tribute to its uniform." Those are the real words.

the preceding paragraph also makes reference to the plaintiff. I would, first--

THE COURT: What is the false statement that is libel before we get into any question about extra media privilege or anything like that? Let's assume this is between Clinton Caron and Joe Smith.

MR. SHIRO: He carries too much mass to be either an effective cop on the beat or a tribute to its uniform. He's not and was not a cop on a beat, number one. Secondly he is and was a tribute to his uniform.

THE COURT: What is a cop on a beat?

MR. SHIRO: Certainly, that's something, that has been the subject of depositions that I believe that have been filed with the Court.

THE COURT: Isn't that a matter of opinion? Let's assume we have a police officer who has won all kinds of medals and he went out one night and that someone makes some critical statements about that

police officer alleging police brutality and those statements happen to be heard and printed by the newspaper media. Is the newspaper subject to a libel?

MR. SHIRO: Possibly. Whether a statement is one of fact or opinion varies with the circumstances. I think

most courts in Maine--

THE COURT: Don't you have to know who it is to libel him? What if they write in the editorial they talk about judges coddling criminals? What if they write an editorial about lazy judges? Can I get a lawyer and get up a complaint and file it against the Bangor Daily News?

MR. SHIRO: No. I think you have to make reference to the plaintiff. There has to be sufficient words of identification. We think there are. We think it's obvious that--

THE COURT: Let's say that the plaintiff Kubetz goes back and says I got through my motion day today at 11:15 and the editor

thinks the judge is sitting around doing nothing all day. He writes an editorial about lazy judges without any reference to any particular judge other than there was a motion that was heard and ours was the last motion for the day and it was at 11:15. Are they libel?

MR. SHIRO: Possibly.

THE COURT: On what basis?

MR. SHIRO: It would depend. The problem, as I see it there, would really be who the statements were really directed towards.

THE COURT: If we had cameras in the courtroom and they had a picture of Mr. Kubetz arguing before me and then I could sue for libel if they didn't have that?

MR. SHIRO: I don't know if that would be enough

THE COURT: What is enough? What is the difference between that case I gave you that I have given you and the case we have before us today?

MR. SHIRO: We have the paragraph that reads in Waterville, as with so many other municipal police departments there is a city cop, a sergeant no less. Mr. Caron is a city cop and he's a sergeant who makes a Jackie Gleason look like--

THE COURT: Is that a false statement?

MR. SHIRO: That he's a city cop and sergeant? That's not false, that's true.

THE COURT: What about the next part of the statement?

MR. SHIRO: Who makes Jackie Gleason look like--

THE COURT: Is that a false statement?

MR. SHIRO: Yes.

THE COURT: Have you seen the picture?

MR. SHIRO: Yes.

THE COURT: Is that a false statement or is it a matter of opinion?

MR. SHIRO: It seems to be--a reader could construe that as a matter of fact. So it seems to me without, we don't know Jackie Gleason's height and weight. He knows--

THE COURT: In order to make a statement that says I'm taller than you are I better have your stats or I could be sued for libel?

MR. SHIRO: There must be a factual basis for it and they must be true facts.

THE COURT: Looking at a picture is not enough?

MR. SHIRO: No, that's not enough. But the main statement as far as identification is really he appears in all his rotundity. Well, there is only one photo that it could be. They have already admitted that's the photograph, and several other readers, of course, one of which was deposed, already has identified the plaintiff as the one who is spoken of in that article. As far as identifying the plaintiff there is no problem at all. You don't have to mention, it's never been the law that you have to mention the plaintiff by name. As long as we can show that there are sufficient facts that an average reader would know that they're talking about the plaintiff that's sufficient.

THE COURT: How is this case distinguished from the case v. Regan? Comments were made and they're directed at his official actions and they seem to relate to qualifications and of his official functions. How was there any exception to this case from the Rouche case?

MR. SHIRO: I don't think we need an exception. The Rouche case, of course, the Law Court remanded the case because there were improper instructions. I think the Court has identified the similarities between Rouche and this case. Certainly we don't object to the idea that these statements

are made concerning his work and, in fact, we say, therefore, they're libel per se, and I don't think there is--

THE COURT: Libel per se because they concern his functions as a public official?

MR. SHIRO: No, because they impune his ability to work and--

THE COURT: So were the statements in Rouche.

MR. SHIRO: That is the similarity. That is why, as the Court is aware, there were certain categories of statements that are considered libelous per se. One of those categories concerns statements made about a person's ability to work and capacity to work, and, certainly, that's what the concern is here. That's what the defendant has already admitted through its answers to interrogatories and through memoranda.

THE COURT: So a newspaper making statements about a public official's capacity for work or ability to work, his competence, is libel per se?

MR. SHIRO: Yes.

THE COURT: So if the Bangor Daily News says we don't think the governor is doing a good job, he's performing lazily, the representative or whoever has been charged with being lazy and incompetent and malingering, he can file a libel suit and it could be libel per se?

MR. SHIRO: It could be. It depends--

THE COURT: So if the Bangor Daily News publishes an article that says Representative X is lazy and incapable of performing his functions, all of that is libel per se?

MR. SHIRO: It could be. It seems to me you must focus on the precise language that is used. Here they didn't say it's our opinion or he may be ineffective. They said he carries. You could put the words he does carry.

THE COURT: What are the differences between this and actions that Mr. Sullivan didn't like back in the New York Times v. Sullivan case? They were much more specific allegations there about how people were being treated than in the Rouche situation. Weren't those factual allegations much more specific?

MR. SHIRO: No, I don't think so at all. I don't think they were. In that case some of them weren't even disputed, so that's a key distinction. We dispute everything here. Almost every court agrees that the First Amendment is certainly one of the most precious rights there is; therefore, deserving

the utmost protection of the law, therefore, we have this quite difficult standard we have to prove by clear and convincing evidence that the defendant did have knowledge or falsity or reckless disregard of truth and/or falsity. But the real issue, as I see it here, the defendant asserts that this article contains absolutely no facts at all. Well, of course, we disagree with that as our affidavits and

memoranda show. I think if the Court had the opportunity to review the depositions that were taken the Court would see that even more. It seems to me that where that issue is in dispute summary judgment should be denied for that reason alone.

Also, the defendant has cited a policy which supposedly favors summary judgment. That policy has been disproved by the United States Supreme Court. The real issue here is whether the privilege of fair comment and criticism really applies here. It's a qualified privilege. It was never an absolute privilege. And if we can prove actual malice it seems to me the plaintiff ought to be allowed to do so.

We have gone that process. We have set up the deposition of the author of the article which is scheduled for July 19th. It seems to me that we ought to, the plaintiff at that time will be able to offer even further evidence of reckless disregard of truth and falsity.

Another point I would like to make to the Court is that the defendant in no media can ever justify, in fact, entertain no serious doubts because as the Supreme Court and every other court has said they're not going admit that they entertain serious doubts about the truth or falsity about any articles that they wrote. The jury can disbelieve the defendant when he makes such a statement. We realize that it's our burden to show that, but it can be shown, and it can be inferred from all of the circumstances involved. And here we have gone to build the case. They have already admitted that they knew nothing about the plaintiff. They undertook no investigation they

acknowledge. They don't even acknowledge the need to make any investigation. They're simply relying and trying to say that there is an absolute privilege for media defendants to express opinions on anything they want regardless of the truth or falsity on the facts.

THE COURT: So, in other words, if they express an opinion on something on facts underlying the opinion and all or some of those facts are false that's libel?

MR. SHIRO: Some courts would say so, yes. There is a divergence of opinion on that subject. You may be familiar with the restatement of torts.

THE COURT: I'm not familiar with restatement of torts as I am with the position of the Maine Supreme Court and the Federal Appellate Courts and the United States Supreme Court. I don't know how they play that game.

MR. SHIRO: The United States Supreme Court has never approved the restatement of the tort position which, basically, is that if the facts underlying the opinion are

expressed within the article or editorial
or whatever it happens to be, then we can't
have libel. That is the American Law
Institute's position. However, that position
has never been the law hardly anywhere that
I know of. There

are now courts that have adopted that position, but then the issue becomes one as to whether that is a statement of fact or just a mere expression of opinion. It seems here there is ample evidence, I think there is overwhelming evidence, that an average reader which is the traditional test used to determine whether some statement is one of fact or opinion, a reader could determine that these are statements of fact about the plaintiff, and that the defendant is saying that the plaintiff is too fat to be an effective cop on a beat or a tribute to his uniform.

THE COURT: That's opinion, isn't it?

MR. SHIRO: No.

THE COURT: They're saying how can one who appears to be that heavy be a tribute to his uniform.

MR. SHIRO: I don't think so.

THE COURT: Everytime we see one of these Air Force Generals running around too heavy we had better keep our mouths shut?

MR. SHIRO: Not necessarily. I think you have to look at the whole article, the

whole purpose of the article. If the article's focus was as general as they wanted it to be or had alleged why did they make reference to anybody specifically? Isn't it reasonable to assume or isn't it reasonable for an average reader to think what really is going on here is that the plaintiff was an additional factual basis for the opinions expressed? In other words, based on this photograph of the plaintiff in this newspaper they thought, well, here's a guy who's obviously too overweight to be effective at all, never mind being a tribute.

THE COURT: What is wrong with that?

MR. SHIRO: That is not what they said.

THE COURT: How could he be a tribute to the uniform?

MR. SHIRO: They didn't put it in the form of a question. They stated it as a matter of fact.

THE COURT: You admit they could say the same words but you don't like the way they said it? You say you don't like the exact words

but they could almost say the same thing and get away with it?

MR. SHIRO: There is a possibility, I have to acknowledge that they could have expressed an opinion, but it seems to me even then they would have been hard pressed in--

THE COURT: Anytime you speak you better say whether--let's get the exact words: "By any reasonable standard he carries too much mass to be either an effective cop on the beat or a tribute to its uniform." If they said it's our opinion that by any reasonable standard he carries and that's enough?

MR. SHIRO: No. We cited a case where statements by a lawyer to a judge that the judge alleged were defamatory and the lawyer's statements were--

THE COURT: You better watch when you are talking to judges. Lawyers don't have privileges while talking to judges.

MR. SHIRO: I don't know about that. But it seems to me no matter any privilege can be abused and the point that I was trying to make was that in that case and in many other

cases the people, the defendants prefaced their comments by the words in my opinion. But that made no difference, absolutely no difference to the Court because nevertheless of the contents of the words used the whole situation they still could be construed as statements of fact and not opinion. So even if they used the words "in my opinion" that makes no difference at all.

Thank you.

THE COURT: I'm going to grant the motion and order judgment for the defendant. Plaintiff's not entitled to relief. I think it's a matter of opinion. I think it's clear that the statements may be disagreeable to some, but they are statements of opinion. They do not rise to the level to justify action for libel.

(Thus concluded the hearing.)

* * *

STATE OF MAINE

Kennebec, ss.

SUPERIOR COURT

CV-82-581

Clinton P. Caron Plaintiff

vs.

ORDER

Bangor Publishing Co. Defendant

This cause came on for hearing, and was argued by counsel, upon the motion of the Defendant for Summary Judgment.

IT IS ORDERED, that:

1. Motion for Summary Judgment granted.

2. Judgment for the Defendant that the Plaintiff is not entitled to the relief he seeks.

Dated: 6-24, 1983

Donald G. Alexander
Justice, Superior Court

STATE OF MAINE

SUPERIOR COURT

KENNEBEC, SS.

Civil Action

Docket No. 82-581

* * * * *

CLINTON P. CARON

*

Plaintiff

*

v.

MOTION FOR FIND-
INGS OF FACTS AND
CONCLUSIONS OF
LAW (Rule 52)

BANGOR PUBLISHING COMPANY

*

Defendant

*

* * * * *

Defendant moves this Court, pursuant to Rule 52 of the Maine Rules of Civil Procedure, to set forth its findings of fact and conclusions of law with respect to its June 24, 1983 decision granting Defendant's Motion for summary judgment.

Dated: June 29, 1983

BANGOR PUBLISHING CO.

By _____

Bernard J. Kubetz, Esq.

Of the firm of Eaton,

Peabody, Bradford &

Veague, P.A.

Attorneys for Defendant

P.O. Box 1210

6-30-83

Bangor, Maine 04401

The order of June 24, 1983, was based on the Courts review of the file, the decision by the parties on the record at the hearing, and the reasons stated by the Court on the record at the hearing. As the ruling was on a motion for summary judgment, findings of fact are not appropriate and the Courts conclusions have already been stated on the record.

Ordered: Motion for findings and conclusions is denied.

Donald G. Alexander

STATE OF MAINE

KENNEBEC, SS.

SUPERIOR COURT

CIVIL ACTION

Docket No.

CLINTON P. CARON

OF WATERVILLE, MAINE

COUNTY OF KENNEBEC,

Plaintiff

VS.

BANGOR PUBLISHING COMPANY

d/b/a BANGOR DAILY NEWS,

A CORPORATION DULY ORGANIZED AND

EXISTING UNDER THE LAWS OF THE

STATE OF MAINE AND HAVING ITS

PRINCIPAL PLACE OF BUSINESS IN

BANGOR, MAINE

COUNTY OF PENOBSCOT,

Defendant

COMPLAINT

NOW COMES the Plaintiff, CLINTON P. CARON, and
complains against the Defendant, BANGOR
PUBLISHING COMPANY, d/b/a Bangor Daily News,
and says that:

1. At the time of the commission of the wrongs hereinafter mentioned and for a long time prior thereto, Plaintiff was and still is, a citizen and resident of and conducted his business in the City of Waterville, County of Kennebec, and State of Maine and adjacent communities, and has always enjoyed the respect, confidence, good opinion and esteem of his neighbors, as well as of all others in the community, and has established among the people of said community an excellent reputation for skill and ability in his occupation, for honesty, integrity and good character. Plaintiff has never been guilty of any crime or offense or violation of the law which would tend to lessen the respect, confidence and esteem which he has enjoyed and to which he was entitled. Plaintiff, through his occupational activity, public service to the people of his community and otherwise, has extended his aforesaid reputation generally among the public officials, businessmen and the public

generally in the City of Waterville and throughout the areas adjacent to the City of Waterville and throughout the State of Maine.

2. The Defendant is a corporation duly organized and existing under the laws of the State of Maine and has its principal place of business in Bangor in the County of Penobscot and State of Maine. At all times material herein and for a long time prior thereto, Defendant was and still is engaged in the business of publishing a daily newspaper known as Bangor Daily News. Said newspaper is a newspaper of general circulation in the County of Penobscot and the surrounding areas. Said newspaper published by Defendant in the County of Penobscot has a very large and extensive circulation in the counties of Penobscot and Kennebec, and throughout the State of Maine and elsewhere. The news items and editorials of said newspaper are extensively copied and

commented upon by all of the leading newspaper presses, radio and television stations, and other media of communication in the State of Maine.

3. On or about August 25, 1982 and August 28, 1982, Plaintiff was a police officer, namely, a sergeant, in the police department of Waterville, Maine; and he has been a police officer in said department since 1962.
4. At all times material herein and for some time prior thereto, Plaintiff was and still is a public officer, namely, a police officer, during which time Plaintiff enjoyed not only the confidence of his official superiors, but also, the esteem and respect of all who knew him and of the community in general.
5. On or about August 28, 1982 and at all times material herein, Defendant, through its agents, servants and employees did make, compose and publish a certain writing and

editorial, a copy of which is attached hereto as Exhibit A and made a part hereof.

6. Defendant, well knowing the premises, and intending to injure the Plaintiff and to deprive him of his good name, fame, credit, business, and reputation and further wickedly intending to cause the Plaintiff to be removed from his said public office, on or about August 28, 1982 and at all times material herein, through its agents, servants and employees, did falsely, maliciously, wickedly and illegally make and publish of and concerning the Plaintiff in his official capacity as a public officer and otherwise, false, scandalous, illegal, defamatory, and malicious writing and libel, a copy of which is attached hereto as Exhibit A and made a part hereof.
7. Said malicious writing and libel was printed on an editorial page of said newspaper and said writing, article and editorial contained a large headline entitled "Obesity in the ranks". Said

writing, article and editorial, in addition to the abovequoted headline, contained, among others, the following statements: "In Waterville, as with so many other municipal police departments, there is a city cop, a sergeant no less, who makes Jackie Gleason look mininutive. He appears, in all his rotundity, in an Associated Press photo of the Waterville street slaying." "But by any reasonable standard he carries too much mass to be either an effective cop on the beat or a tribute to his uniform."

8. In said writing, article and editorial, the words "Associated Press photo of the Waterville Street slaying", mean and refer to a photo that appeared on the front page of Defendant's said newspaper in the August 25, 1982 edition, a copy of which is attached hereto as Exhibit B and made a part hereof.
9. Said photo also has appeared in other newspapers of general circulation through-

out the State of Maine on or about the
aforesaid date and thereafter.

10. Said photo contains a picture of the
Plaintiff.
11. In said writing, article and editorial,
the words "city cop", "sergeant", "He"
and "his" all mean and refer to Plaintiff
and by composing and publishing said
writing, article and editorial, Defendant
intended to and did charge Plaintiff with
being an ineffective and unfit police
officer and with being a disgrace to his
uniform
12. The charges in the said writing are false.
13. Defendant well knew or should have known
that the charges were untrue when it made
them.
14. Said writing, article and editorial is
false, malicious, improper and unlawful
libel. Plaintiff denies the truth of
all charges so injuriously made against

him in said writing, article and editorial by Defendant.

15. Defendant knew or should have known that such statements were and are libelous, defamatory and were published with actual malice and were intentionally, wantonly, wilfully and wrongfully made public in an effort to discredit, malign, injure and impugn the abilities and integrity of Plaintiff, all to his great damage.
16. Material defamatory of Plaintiff's personal and professional reputation and abilities was and is contained in said defamatory matter, all of which was and is contrary to the truth and all of which was and is contrary to the information available to the Defendant prior to the publication of said material.
17. Defendant, in composing, publishing and disseminating said defamatory matter to the public, acted recklessly and in a grossly

irresponsible manner without due consideration for the standards of truth and veracity ordinarily followed by responsible persons, and acted with reckless disregard of truth or falsity and knew or should have known that said statements were false and that a false impression would be created which could inure to and be damaging to Plaintiff.

18. Defendant failed to investigate the truth of the facts published concerning Plaintiff and failed to make any reasonable inquiry and was grossly negligent in such failure to inquire. The falsity of the said writing and editorial would have been disclosed to Defendant had it made any proper or reasonable inquiry concerning the facts published. The writing and editorial was printed, published and circulated by Defendant with such reckless disregard and carelessness as to its truth or falsity as to indicate an utter disregard of the rights of Plain-

tiff and inexcusably exposing Plaintiff to public hatred, contempt and ridicule and impeaching Plaintiff's integrity and reputation as a human being and in his profession, and causing Plaintiff substantial and great injury and damage.

19. As a direct and proximate result of the printing, publishing and circulation of the said untrue and libelous statements By Defendant in its said newspaper, Plaintiff has been and will be exposed to public hatred, scorn, distrust, contempt and ridicule. Said Defamatory and untrue statements have been, are and will be a source of great embarrassment and humiliation to Plaintiff, thereby causing Plaintiff to suffer distress of mind and mental anguish. Plaintiff's health has been affected, and he has suffered and shall continue to suffer, from acute nervousness, and bodily pain, and other injuries to his reputation and otherwise and by means of the premises, Plaintiff has

suffered damages in the amount of Three
Hundred Thousand (300,000) Dollars.

20. As a direct and proximate result of the false, defamatory, wilful and malicious printing, publishing and circulation of the said untrue and libelous statements of Defendant in its said newspaper, and the circumstances relevant thereto, Plaintiff also is entitled to recover punitive damages in the sum of Three Million (3,000,000) Dollars.

WHEREFORE, the Plaintiff, CLINTON P. CARON, demands judgment against the Defendant, BANGOR PUBLISHING COMPANY, in the sum of Three Hundred Thousand (300,000) Dollars as actual damages and Three Million (3,000,000) Dollars as punitive damages, plus interest and costs.

Dated: November 29, 1982

s/Burton G. Shiro, Esq.
Attorney for Plaintiff
86 Silver Street
Waterville, Maine 04901

EXHIBIT A

BANGOR DAILY NEWS

491 Main St., Bangor, Maine 04401 (207-942-4881)

Sat.-Sun., August 28-29, 1982

V. Paul Reynolds, Editorial Page Editor

A. Mark Woodward, Assistant Editor

EDITORIAL

OBESITY IN THE RANKS

Newspapers across the country used the word "fat" and "fatso" in describing the 500-pound New Jersey rapist who was free by a judge concerned for the big man's health.

A public outcry is expected to shorten Mr. Giorgianni's respite from the slammer. Meanwhile, we find ourselves in a state of utter shock. Not because a judge coddled a lawbreaker, we're used to that. No, we're shocked because not a soul has stepped forward to register indignation with the adjectival license taken by the news media with this man's physical stature.

Where is the American Civil Liberties Union, the Italian Anti-Defamation League or the Guardians of Corpulence?

Perhaps it is because the man is a convicted rapist. If he had been a homosexual roller-skating champion, a national pie-eating standout, or a teen-age draft dodger, the adjectives would have been more charitable. The New Jersey restaurateur would have been described as a stout Gay or a rotund activist.

This is after all the age of tolerance and enlightenment, the era of the anorexic and the euphemism. Fat, though a perfectly pointed and clear adjective, is becoming rare in common usage, except to characterize those whose moral depravity can be overlooked only by those of the bench.

We get into all of this by way of editorial writer's frustration. For years, we have yearned to address the topic of overweight policemen- fat cops, if you will. We've resisted this as an issue, though.

We did not want to appear either trivial or insensitive. Some people, according to recent research, can not help extreme overweight.

But cops can. As a rule, police departments do not hire unfit rookies. The girth comes with time. There is, after all, a military dimension to law enforcement. A policeman is expected, not only to wear a uniform with pride, but to be able to run at least as fast as a felon, who is invariably nimble of foot and as lean as Bill Rogers.

In Waterville, as with so many other municipal police departments, there is a city cop, a sergeant no less, who makes Jackie Gleason look diminutive. He appears, in all his rotundity, in an Associated Press photo of the Waterville street slaying.

He may be the most dedicated cop in Maine. He may know his stuff. He is in all probability somebody's loved one. But by any reasonable standard he carries too much mass to be either an effective cop on the

beat or a tribute to his uniform. In short, physical conditioning is, or should be, a condition of employment for those responsible for public safety and law and order.

There! It feels good to have said it, especially while the simple, three-letter word "fat" is still being used by newspapers and has yet to be euphemized into linguistic obscurity.

EXHIBIT B



(AP Photo)

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-82-581

CLINTON P. CARON

Plaintiff

v.

BANGOR PUBLISHING COMPANY

Defendant

AFFIRMATIVE
DEFENSES AND
ANSWER

Defendant, Bangor Publishing Company,
responds to Plaintiff's Complaint as follows:

FIRST AFFIRMATIVE DEFENSE

As and for its First Affirmative Defense,
Defendant alleges that the statements com-
plained of are protected under, and Plaintiff's
claims are barred by, the First Amendment
to the Constitution of the United States and
Article I, Section 4 of the Maine Constitution.

SECOND AFFIRMATIVE DEFENSE

As and for its Second Affirmative Defense,
Defendant alleges that the subject article
is an editorial, or statement of opinion,
and is protected under the First Amendment
of the United States Constitution and Article
I, Section 4 of the Maine Constitution.

THIRD AFFIRMATIVE DEFENSE

As and for its Third Affirmative Defense, Defendant alleges that the subject article relates to the Plaintiff in his capacity as a public official, and is within the exercise of Defendant's Constitutionally protected rights of freedom of speech and freedom of the press as guaranteed and secured by the First Amendment of the United States Constitution and Article 1, Section 4 of the Maine Constitution. Further, the said article was published and prepared by Defendant in good faith and without actual malice.

FOURTH AFFIRMATIVE DEFENSE

As and for its Fourth Affirmative Defense, Defendant alleges that the statements contained in the subject article are substantially and, in fact, true and therefore protected under 14 M.R.S.A. § 152.

ANSWER

1. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 1 of the Complaint and, therefore, denies the same.

2. Defendant admits that it is a corporation duly organized and existing under Maine law with its principal place of business in Bangor, Maine. Defendant further admits that it is, and has been at all times relevant to this matter, engaged in the business of publishing the Bangor Daily News, a daily newspaper of general circulation in northern and central Maine. Defendant is without knowledge concerning the remaining allegations contained in paragraph 2 of the Complaint and, therefore, denies the same.

3. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 3 of the Complaint and, therefore, denies the same.

4. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4 of the Complaint and, therefore, denies the same.

5. Defendant admits the allegations contained in paragraph 5.

6. Defendant admits that it published the editorial attached to Plaintiff's Complaint as Exhibit A. Defendant denies the remaining allegations contained in paragraph 6.

7. Defendant admits that it published the said editorial containing the statements referred to in paragraph 7 of the Complaint. Defendant denies the remaining allegations contained in paragraph 7.

8. Defendant admits the allegations contained in paragraph 8.

9. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 9 of the Complaint and, therefore, denies the same.

10. Defendant is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph 10 of the Complaint and, therefore, denies the same.

11. Defendant admits that the editorial's reference to "City cop", "Sargent", "He" and "His" all mean and refer to the Waterville police officer depicted in the photograph published by Defendant on August 25, 1982. Defendant is without knowledge as to whether that individual is, in fact, Plaintiff and therefore denies the same. Defendant denies the remaining allegations contained in paragraph 11.

12. Defendant denies the allegations contained in Paragraph 12.

13. Defendant denies the allegations contained in paragraph 13.

14. Defendant denies the allegations contained in paragraph 14.

15. Defendant denies the allegations contained in paragraph 15.

16. Defendant denies the allegations contained in paragraph 16.

17. Defendant denies the allegations contained in paragraph 17.

18. Defendant denies the allegations contained in paragraph 18.

19. Defendant denies the allegations contained in paragraph 19.

20. Defendant denies the allegations contained in paragraph 20.

WHEREFORE, Defendant prays that Plaintiff's Complaint be dismissed, and for such other and further relief as the nature of the case may require.

Dated: December 16, 1982.

BANGOR PUBLISHING
COMPANY

BY s/ Bernard J. Kubetz,
Bernard J. Kubetz, Esq.
Of the firm of Eaton,
Peabody, Bradford
& Veague, P.A.
Attorneys for Defendant
P. O. Box 1210
Bangor, Maine 04401

STATE OF MAINE

KENNEBEC, SS.

SUPERIOR COURT

Civil Action

Docket No. CV-82-581

CLINTON P. CARON

Plaintiff

v.

BANGOR PUBLISHING COMPANY

Defendant

* DEFENDANT'S ANSWERS
* TO PLAINTIFF'S
* INTERROGATORIES

Defendant responds to Plaintiff's

Interrogatories as follows:

1. Identify yourself by stating your name, home address, current occupation, business address, date of birth, height, and weight.

ANSWER: My name is V. Paul Reynolds and I reside on the Main Road in Winterport, Maine. I am employed as Managing Editor of the Bangor Daily News, 491 Main Street, Bangor, Maine. My date of birth is July 10, 1940. I am approximately 5' 11" and weigh 160 pounds.

2. At the times alleged in the complaint filed herein, did you know the Plaintiff?

a. For how many years did you know him?

b. To what extent did you know him?

c. Did you know that he was married and had a family?

d. Did you know that he was and is a member of the Waterville, Maine Police Force?

ANSWER: No.

3. What is the corporate Defendant's correct title?

a. In what state and in what year was it incorporated?

b. If it was not incorporated in this state, was it licensed to do business in this state?

c. If it was licensed, in what year did that occur?

d. What is the name and address of the corporate Defendant's registered agent for the service of process?

ANSWER: Bangor Publishing Company.

- a. 1891 in Maine.
 - b. Not applicable.
 - c. Not applicable.
 - d. The Clerk of the corporation is
Malcolm E. Morrell, Jr., Merrill
Center, Exchange Street, Bangor,
Maine 04401.
4. At the times alleged in the complaint,
who was the owner of the newspaper
known as Bangor Daily News, and what
is his residence address?
- a. On what days of the week was and is
said newspaper published?
 - b. Who was and is the president of the
Defendant corporation, and what was
and is his address?
 - c. Who was and is the publisher, and what
was and is his address?
 - d. What was and is the name and address
of the editor (s) of said newspaper?
 - e. What was the name, address, and title
of any other editor of the newspaper,

having any duties with respect to preparation or publication of the article complained of?

- f. What are the names and addresses of officers and employees who were in charge of, or in any way responsible for the contents, printing, publication, and distribution of said newspaper?
- g. What are the names and address of officers and employees who made the general policy, and advised the editorial writers on the editorial policy of the newspaper?
- h. What are the names and addresses of officers and employees who possessed the power to hire and discharge employees?
- i. What are the names and addresses of officers and employees:
 - 1. Who were responsible for publication of Defendant newspaper;
 - 2. Who were final arbiters on

questions or disputes arising in the course of the publication of the newspaper;

3. Who had final authority on controversies arising among the staff; and
4. Who determined what news articles might appear or be withheld from publication?

ANSWER: The owner of the Bangor Daily News is the Bangor Publishing Company, 491 Main Street, Bangor, Maine.

- a. Monday through Saturday.
- b. Joanna J. Van Namee, 491 Main Street, Bangor, Maine.
- c. Richard K. Warren, 491 Main Street, Bangor, Maine.
- d. Richard J. Warren, 491 Main Street, Bangor, Maine.
- e. V. Paul Reynolds, Editor, Editorial page, 491 Main Street, Bangor, Maine.
- f. Defendant objects to Interrogatory 4(f) on the basis that the Interrog-

atory is overly broad, oppressive and unduly burdensome, and is not likely to lead to the discovery of admissible evidence. Without waiving the foregoing, Defendant states that the officers and employees who were in charge of, or in any way responsible for, the contents, printing, publication, and distribution of the Bangor Daily News number 300 individuals. Those persons who were directly involved with respect to the subject editorial are identified elsewhere in these Interrogatory Answers.

- g. Richard K. Warren, Richard J. Warren, V. Paul Reynolds and A. Mark Woodward, all an address of 491 Main Street, Bangor, Maine.
- h. Defendant objects to Interrogatory 4(h) on the basis that the Interrogatory is overly broad, oppressive and unduly burdensome, and is not likely to lead to the discovery of admissible evidence.

1. 1. Richard K. Warren.
2. Richard K. Warren, Richard J. Warren, V. Paul Reynolds and A. Mark Woodward.
3. Richard K. Warren.
4. Richard K. Warren and Richard J. Warren.
5. At said times, were V. Paul Reynolds and A. Mark Woodward employed by Defendant corporation and newspaper as editorial editors and/or other editors?
 - a. If so, state whether they or either one of them wrote the article set forth in the complaint and set forth their length of employment with Defendant, ages, height, weight and any prior newspaper experience.
 - b. If they did not write the article, who did?
 - c. Was said article read by the Defendant's President and Publisher before publication?
 - d. If the answer to (c) is yes, state

when, and under what circumstances said article was read by said Defendant before publication.

- e. Was said article read by any other editor of Defendant newspaper before publication?
- f. If the answer to (e) is yes, state by whom, when, and under what circumstances said article was read by such other editor before publication.

ANSWER: Yes.

- a. V. Paul Reynolds wrote the editorial. He has been employed the the Bangor Publishing Company for approximately 13 years, is 42 years old, is 5'11" and weighs approximately 160 pounds. A. Mark Woodward is 35 years old, has been employed by the Bangor Publishing Company for approximately 12 years, is 5'8" tall and weighs 165 pounds.
- b. Not applicable.
- c. Yes.

- d. On the day before August 27, 1982.
- e. No.
- f. Not applicable.
- 6. Before said article was published, what inquiry or investigation did you or any employee(s) of Defendant make concerning the statements of fact contained therein and all other assertions, opinions, etc?
 - a. On what dates did you or such employee(s) conduct such investigation?
 - b. Who did you or such employee(s) speak to about said matters contained in said article? (Give names and addresses, or descriptions for identity or location of persons.)
 - c. What information did you or such employee(s) receive from each of said persons?
 - d. Was the information in writing or in oral form?
 - e. What writings or records do you have concerning the information you received?

- f. If you have such writings or records, where are they now?
- g. What is the name and address of your agent or employee who has possession or custody of such writings or records?
- h. Did you or any employee(s) obtain any information about factual statements, in the publication from any other sources?
- i. From what other sources did you or such employee(s) obtain information? (Be particular, giving names, addresses, identities, documents, records, and writings involved.)
- j. What inquiry and investigation did you or any employee(s) make of such other sources? (Be particular, giving names, addresses, identities, documents, records, and writings involved.)
- k. If you made none, please explain why none was made.

ANSWER: The editorial in question contains no

statements of fact. The background information concerning Mr. Giorgianni was obtained from earlier newspaper articles concerning Mr. Giorgianni, who had been the subject of much public comment during the weeks prior to August 28, 1982. The editorial represents a statement of opinion concerning the desirability that law enforcement officials be physically fit, and no specific inquiry or investigation was undertaken with regard to the editorial.

- a. Not applicable.
- b. A. Mark Woodward.
- c. A. Mark Woodward and V. Paul Reynolds discussed the importance of physical fitness in law enforcement.
- d. Oral.
- e. Not applicable.
- f. Not applicable.
- g. Not applicable.
- h. No.
- i. Not applicable.

- j. Not applicable.
- k. See Answers to previous Interrogatories.
- 7. Did you or any employee(s) give any consideration or benefit to any informant for such information?
 - a. What is the name and address of each informant to whom you or any employee(s) gave such consideration or benefit?
 - b. What was the amount and nature of the consideration or benefit?

ANSWER: No.

- a. Not applicable.
- b. Not applicable.
- 8. Have you or any employee(s) employed any informant from whom you obtained information? If you have, state with respect to each informant employed:
 - a. The date and terms of his employment;
 - b. The nature of the duties of his employment;

- c. The compensation or benefit he was given in connection with his employment;
- d. The name of the person who engaged the informant; and
- e. Whether the informant submitted an application for employment in writing. If he did, request is herewith made for a copy of the same.

ANSWER: No.

- 9. What are the names, addresses, and positions of all agents, associates, and employees of the Defendant corporation who contributed or participated in any manner in the preparation of said article, whether by gathering information or otherwise, and who participated in the composition and editing thereof, other than persons heretofore specifically named herein?

ANSWER: V. Paul Reynolds and A. Mark Woodward. Other employees may have had peripheral roles.

10. Did you keep and maintain a "morgue" containing items about persons and things that were published in your newspaper? If so. . .
- a. Do you still keep and maintain the same?
 - b. Did you examine the same for items pertaining to Plaintiff and the subject of the article, and what did you find? Request is made for a copy of all materials identified by you in response to this Interrogatory.

ANSWER: Yes.

- a. Yes.
 - b. No.
11. Did Defendant or its employees or agents, contact the Plaintiff about the article before it was published?
- a. What is name of any person, employee or agent who did?
 - b. What was the date of contact?
 - c. What was the form or manner of contact? (Face to face, telephone or

writing?)

- d. What was said or written in each such contact?

ANSWER: No.

12. Did you or any employee inform the Plaintiff that you were going to publish the article?
- a. Did the Plaintiff consent to the publication of the article as it appeared in the newspaper?
- b. Did the Plaintiff object to the publication of same or any part thereof, and, if the latter, what part?
- c. What did the Plaintiff say that led you to believe he consented or objected to the publication?
- d. Did you receive any written communication from the Plaintiff concerning the publication of said article?
If so, request is made for a copy of same.
- e. Thereafter, did you examine or reexamine any records, or papers,

in your possession or in the custody of others, concerning the factual statements in the article?

1. What records or papers did you so examine? Describe them so that they may be identified.
2. What information did you find and obtain from them concerning the accuracy of the factual statements in the article, and reliability of the source?
3. What are the names and addresses of the persons who had custody of such records or papers?
4. Did you or any employee(s) make any notes as to such records or paper? If so, request is made for a copy thereof.

ANSWER: No.

- a. Not applicable.
- b. Not applicable.
- c. Not applicable.
- d. Not applicable.

- e. Not applicable.
- 13. Prior to the publication of the article, did you or any employee have any differences or controversy with the Plaintiff or any other police force or officers? If so, what was the approximate date of such differences and what was their nature?

ANSWER: No such discussions with regard to this article. We do, as a matter of routine, report on activities of various law enforcement agencies.

- 14. Did you or any employee(s) participate in any decision by the management of the newspaper to criticize or comment about the Plaintiff in any way or any police officer for his personal appearance, job performance, or any other reason?
 - a. On what date was the decision made, and what reasons were advanced for same?
 - b. Did you inform the Plaintiff or any

other persons of such decision?

- c. On what date and by what method did you inform him or such other police officers?
- d. Did you give the Plaintiff or others an opportunity to discuss his job, etc., before said decision was made?
- e. Did you announce your decision to criticize Plaintiff in said newspaper?
- f. On what date and in what manner did you make the announcement? (If such announcement was made by an editorial, news article, or by written or printed communication, request is made for a copy.)

ANSWER: To the extent that the question implies that the editorial criticizes or comments about the Plaintiff personally in any way or any police officer for his personal appearance or job performance, the decision to write the subject editorial was made shortly before August 27, 1982. The

editorial staff at the newspaper has discussed the general concept of physically fit law enforcement officials. Mr. Caron was not discussed specifically with all members of the editorial staff.

- a. August 27, 1982. The basis for authorizing the editorial was the issue of physically fit policemen.
 - b. No.
 - c. Not applicable.
 - d. No.
 - e. No.
 - f. Not applicable.
15. Did you receive or have you received any communications from readers in regard to your criticism and comments about the Plaintiff or the article which is the subject of the complaint? What communications did you receive? (Request is made for copies.)

ANSWER: Yes, comments and a letter dated August 31, 1982, a copy of which is

enclosed. Also Ronald Laliberte's letter of October 5, 1982, (copy enclosed).

16. On or about what date did you first see "copy" of the publication?
 - a. Did you or any other employee(s) make any changes in the "copy"? If you did, what changes did you make?
 - b. Do you have said original "copy"? If you do not, what is the name, position, and address of the person who has it?
 - c. Upon receipt of "copy," did you make any inquiry as to the factual statements in the publication?
 - d. What is the name and address of the person of whom you made such inquiry?
 - e. What inquiries did you make, and in what form? (Oral or written)
 - f. Did you receive any reply thereto? If you did, state the name, position, and address of the persons from whom you received such reply, and the

information it contained. (If the reply was in writing, request is made for a copy.)

ANSWER: August 28, 1982.

- a. No.
 - b. No.
 - c. No.
 - d. Not applicable.
 - e. None.
 - f. Not applicable.
17. Did you approve the "copy" for publication?
- a. On what date did you approve the "copy?"
 - b. At the time of said approval, were you certain that the factual statements made in the publication were true?

ANSWER: The Publisher approved the publication.

- a. August 27, 1982.
 - b. No factual statements about Plaintiff are set forth in the editorial.
18. At the time you approved the "copy,"

did you have time to verify the factual statements therein before going to press?

- a. What was the hour of approval?
- b. What was the deadline hour for going to the press?

ANSWER: See answers to previous Interrogatories.

- a. Mid-day.
 - b. 5 p.m.
19. After publication of the article, did you learn or have you learned from any source that the factual statements in the publication were not accurate or correct?
- a. What was the source?
 - b. What did you learn? (If in writing request is made for a copy.)

ANSWER: No.

20. Did you investigate or make inquiries in regard to such information?

- a. What investigation or inquiries did you make, and of whom?
- b. What were the dates of inquiry?
- c. What information did you receive?
(If in writing, request is made for copies.)

ANSWER: No.

- 21. What, if anything, did you do about correcting the factual statements in the publication?
(If you published any correction request is made for a copy.)

ANSWER: Since the article contained no factual statements, no corrections were necessary.

- 22. Why did you or your employees choose to make reference in the publication to the Waterville "city cop" and "sergeant" who appears "in an Associated Press photo of the Waterville street slaying?"

ANSWER: Because he was depicted in an Associated Press photograph and the depiction was relevant to the theme of the editorial.

23. State fully your intentions, goals, and purposes in writing and in publishing the article in question and why it was written and published at that particular time.

ANSWER: To focus public attention upon the issue of physically fit and well-conditioned law enforcement officers.

24. At the time of the publication of the said article involved herein, where was the newspaper published?
- a. Where and by whom was it printed?
 - b. List the municipalities, counties, and states in which the said newspaper was distributed.
 - c. What was the total number of copies printed of the issue containing said article?

- d. How many newspapers containing said article were sold?
- e. How many newspapers containing said article were mailed to subscribers?
- f. What was the number of newspapers mailed to each municipality, county and state?

ANSWER: 491 Main Street, Bangor, Maine.

- a. Bangor Publishing Company.
- b. Defendant objects to identifying the municipalities and counties in which the newspaper is distributed on the grounds that supplying that information would be unduly burdensome and oppressive, and on the further ground that said information is not likely to lead to the discovery of admissible evidence in this proceeding. The states in which the newspaper was dis-

tributed are as follows: Alabama,
Arkansas, Arizona, California,
Colorado, Connecticut, Delaware,
District of Columbia, Florida,
Georgia, Hawaii, Idaho, Illinois,
Indiana, Iowa, Kansas, Kentucky,
Louisiana, Maine, Maryland,
Massachusetts, Minnesota, Michigan,
Missouri, Nebraska, Nevada, New
Hampshire, New Jersey, New
Mexico, New York, North Carolina,
Ohio, Oklahoma, Oregon, Pennsyl-
vania, Rhode Island, South
Carolina, Tennessee, Texas,
Vermont, Virginia, Washington,
West Virginia, Wisconsin, Wyoming.

c. 96,406.

d. 91,033.

e. 10,884.

f. Defendant objects to answer this

Interrogatory on the grounds that providing such information would be unduly burdensome and oppressive and is not likely to lead to the discovery of admissible evidence. Without waiving the foregoing, Defendant states that as of August 28, 1982, approximately 634 newspapers were circulated in Kennebec County and of that total, approximately 132 were distributed in the City of Waterville.

25. At the time of said publication, were you a member of the ABC Bureau of Circulation?
- a. What circulation did you report to said Bureau?
 - b. What circulation did you report on the date prior to said publication and also on the date subsequent to said publication?

ANSWER: Yes.

- a. 90,933.
 - b. On February 27, 1982, 78,467 circulation was reported. On August 30, 1982, the figure was 81,340.
26. Did you furnish a copy of the article or any of the information contained therein to any news agency? What are the names and addresses of said agencies, and the dates such copy or information was furnished?

ANSWER: No.

27. Did you furnish a copy of the article or any of the information contained therein to any radio or television broadcasting station? What are the names and addresses of said stations and the dates such copy or information was furnished?

ANSWER: No.

28. Did you broadcast such information over any radio or television station, or cause same to be done? What is the name and address of said station, and the date the information was broadcast?

ANSWER: No.

29. If you have ever ascertained that the statements in the article were not correct or accurate, did you then publish a correction or retraction? (If you did, request is made for a copy.)

a. On what date of the newspaper,

and in what editions thereof?

- b. On what page, and under what heading or title?

ANSWER: Not applicable.

30. Up to the present time, have you or other employees made any correction or further comments or statements or retraction of and about said statements in the publication? (If you did, request is made for a copy.)

- a. On what date of the newspaper, and in what editions thereof?
- b. On what page, and under what heading or title?

ANSWER: No.

31. If you did not publish a correction or retraction, what are the reasons why you did not do so?

ANSWER: We were not contacted concerning a correction or retraction and such

would not likely be an appropriate response to an editorial.

32. Did you or your newspaper publish any other article or articles concerning Plaintiff, either before or after the publication complained of?

- a. What were the dates of publication, the titles of the articles, and the page number of the newspaper where each article appeared? (Request is made that you quote the portions concerning Plaintiff or furnish copies of the publications.)
- b. Did Plaintiff communicate with you or your newspaper about said articles? If so, on what date? (If in writing, a copy of the communication is requested; if not, state your recollection of the communication.)

- c. Did you or the newspaper answer Plaintiff's communication or publish it? (If your answer was in writing, a copy is requested; otherwise, state your best recollection of your answer.)

ANSWER: Yes.

- a. A copy of the article published on December 8, 1982 is attached to these Interrogatory Answers.
- b. No.
- c. We do not understand what this question means when it refers to "Plaintiff's communication", and cannot respond to this question.
33. Please state the names, addresses, telephone numbers, ages, height and weight of all persons who wrote or participated in the writing, drafting and editing of the article in question.

ANSWER: V. Paul Reynolds, 491 Main Street, Bangor, Maine 942-4881, 5'11" tall, 160 pounds, age 42; A. Mark Woodward, 491 Main Street, Bangor, Maine, 942-4881, 5'8" tall, 165 pounds, age 35.

34. Identify by name, address, telephone number and occupation of each and every person consulting or advising you with regard to your answers to these Interrogatories, and to the extent that any such person is not an attorney, indicate the specific instance upon which they advised or consulted, the substance of the information provided, the basis for their personal knowledge of the information provided, and the source of that knowledge, whether documentary or otherwise.

ANSWER: The Answers to these Interrogatories have been developed by V. Paul Reynolds

(information previously provided), Richard J. Warren (information previously provided), and Donald Hanscom, 491 Main Street, Bangor, Maine 942-4881, Circulation Manager. In addition, the Answers were developed and reviewed by Bernard J. Kubetz, counsel for the newspaper. Each of these people contributed in providing information to various questions. Mr. Hanscom's role was limited to Interrogatories 24 and 25.

35. Please describe with specific accuracy the identity and location of each and every document consulted or relied upon by you or any of the persons identified in the preceding Interrogatories in the course of answering these Interrogatories.

ANSWER: The editorial of August 28, 1982, the ABC reports and the article report-

ing on the filing of the lawsuit.

36. Describe specifically and fully the "editorial writer's frustration" and "overweight policemen--fat cops" referred to in the sixth paragraph of the article in question and include in your answer:

- a. Complete definitions and explanations of the meanings that these phrases had and now have for you, and other employees or agents.
- b. Specific and complete descriptions of the role that these phrases played in composing, writing and editing the article in question.
- c. How long this "editorial writer's frustration" existed prior to both composition and publication of the article.
- d. A specific and complete description(s) of the object(s) or focus of this "editorial writer's frustration."

ANSWER: For years, the Bangor Daily News has reported on incidents where the physical fitness of those persons entrusted with public office has been a factor in the performance of their duties. These situations have included the physical fitness and conditioning of policemen and firemen. We have felt that law enforcement officers should be physically fit in order to optimally perform their jobs. Policemen are called upon, as part of their duties, to occasionally engage, or become involved, in confrontational situations with citizens. In those instances, we believe it important that policemen have the ability to choose among all available options, including for example, pursuing a person accused of criminal wrongdoing. The Associated Press photograph (which did not identify Mr. Caron

by name, and who was unknown to the editorial author at the time of publication of the photograph and editorial) provided a specific instance of an obviously overweight public law enforcement officer and a reference point for the subject editorial.

37. Describe specifically, and in complete detail what research or investigation you or your employees did prior to publication or have done since the filing of the complaint concerning Plaintiff, police officers, obesity in general, "felons" in general and the "500-pound New Jersey rapist" and include in your answer the names and addresses of all persons doing such, the date(s) of each and the results or conclusions reached as a result of each investigation.

ANSWER: In preparing the editorial, I referred to previous newspaper articles with respect to Mr. Giorgianni. No specific research was done with respect to the balance of the editorial.

38. Did you or any employee(s) ever communicate in any manner with Plaintiff, any member(s) or employees(s) of the Waterville, Maine, Police Department, any member(s) of the municipal government of Waterville, Maine, or any citizen or resident of Waterville, Maine, prior to publication or composition of the article in question about the subject matter of such article?
- a. If so, state the name, address and job title of each person initiating the communication, the date of each communication, the reason for the communication, the name and

address of each person contacted and the substance of each communication.

- b. If not, state why not, and whether any such communications have been initiated or received since its publication and if so, give the same information about each communication as was requested in part (a) of this Interrogatory.

ANSWER: No.

39. State specifically all bases (including the identification of supporting documents) for your statements or claims that the "Waterville city cop" or "sergeant" appearing "in an Associated Press photo of the Waterville street slaying:"

- a. "Makes Jackie Gleason look diminutive."
b. "Carries too much mass to be either

an effective cop on the beat
or a tribute to his uniform."

ANSWER:

- a. This was not a statement of fact but a metaphorical device.
 - b. This was an expression of opinion.
40. State specifically all bases (including the identification of supporting documents) for your claiming that:
- a. "A policeman is expected, not only to wear a uniform with pride, but to be able to run at least as fast as a felon, who is invariably nimble of foot and as lean as Bill Rogers."
 - b. "Fat, though a perfectly pointed and clear adjective, is becoming rare in common usage, except to characterize those whose moral depravity can be overlooked only

by those of the bench."

ANSWER:

- a. First, it is important to note that both statements referred to in Interrogatory 40 are expressions of opinion rather than statements of fact. It is commonly accepted that a person's physical appearance is related to how one looks to others in a uniform, whether military or public service. A uniform, more than civilian attire, calls attention to itself; hence, a person who takes pride in his or her uniform is expected to be as well-groomed as possible.

Proper body weight is recognized as an integral facet of being physically fit. In "A Manual for Lifetime Physical Fitness," issued

to all new policemen by the Maine Criminal Justice Academy, the introduction states "During the last several years, research has focused on the importance for fitness as a key state for the police officer."

As for "running as fast as a felon", that is important, not only for the policemen's health and the deterrence of crime, but for the general public welfare. A policeman who cannot catch a felon may be tempted to fire his weapon rather than give chase on foot; this can cause undue peril to innocent bystanders.

- b. This paragraph refers specifically to the convicted rapist who we felt was being treated too leniently by the judge. Although the central theme of the editorial in question was fit policemen, a

secondary point was the euphemizing of our language. The editorial writer was attempting to indicate that some descriptive words are being replaced as a result of our contemporary preoccupation with offending those who might not measure up to our cultural stereotypes: "old" are "elderly", "poor are "disadvantaged", "fat" are "overweight", etc.

41. Identify fully by date of publication, page number, title of article, etc., all articles, editorials and other printed matter appearing in your newspaper within the last five years concerning "overweight policemen or fat cops' as these latter phrases were used by you in this article in question.

ANSWER: None.

42. Identify each person whom you

expect to call as an expert witness at trial, including physicians and police officers, and for each such person:

- a. State his name, address, telephone number and job title.
- b. State the subject matter on which the expert is expected to testify.
- c. State the substance of the facts and opinions to which the expert is expected to testify.

d. Provide a summary of the grounds for each opinion.

e. Identify any reports or other documents prepared by that expert.

ANSWER: We have not yet selected any expert witnesses. This Answer will be supplemented as required by the Maine Rules of Civil Procedure.

43. Identify each person whom you will or may call as a witness at trial (name, address, phone number, job title).

ANSWER: V. Paul Reynolds will testify at trial. No other persons have been affirmatively identified as witnesses. This Answer will be supplemented as required by the Maine Rules of Civil Procedure.

44. Identify each document or treatise, book, etc., which you may or will seek to introduce as evidence at trial.

ANSWER: No documents, treatises, books, etc.,

have been identified as exhibits at trial.
This response will be supplemented as required by the Maine Rules of Civil Procedure.

BANGOR PUBLISHING COMPANY

By V. Paul Reynolds, in his
capacity as Managing Editor

Dated: May 25, 1983

Signed as to all objections;

Bernard J. Kubetz, Esq.
Eaton, Peabody, Bradford & Veague
Attorneys for Defendant
P.O. Box 1210
Bangor, Maine 04401

STATE OF MAINE

PENOBSCOT, SS.

May 26, 1983

Personally appeared the above-named V. Paul Reynolds, in his capacity as Managing Editor of Bangor Publishing Company, and acknowledged the foregoing Answers by him signed to be true to the best of his knowledge, information and belief, and insofar as upon information and belief, he

believes them to be true.

Before me Virginia S. Glidden
Notary Public

Our reade

Media cowards

Waterville

To the Editor:

This letter is in response to the distasteful editorial that appeared in the NEWS on Aug. 28-29, which referred to the size of a Waterville police sergeant.

The author of that editorial stated that it felt good to have made a statement about fat cops; I hope he still feels good about his editorial. He probably wouldn't if he knew the unhappiness he caused the officer and his family, not to mention the bad feelings he created for your paper among Waterville area police officers.

It must be nice to be able to snipe at people from a position of anonymity, as is the case with newspaper editorials. Freedom of the press is fine but it can be abused like anything else.

Police officers have to face the people they abuse. Does the author of the editorial have the courage to sign his name to his editorials? Would he write an editorial apologizing for his bad taste and poor judgment? I doubt it.

In this day and age cowards are found everywhere, even in editorial rooms.

Ronald F. Laliberte
Chief, Waterville
Police Department

10/5/82

Do something

Bangor

To the Editor:

Thanks for the editorial "Obesity in the ranks", BDN, Aug. 28-29).

Yesterday I arrived at Bangor International Airport and had the poor opinion of the Bangor Police Department boosted when we saw a big fat police officer with his belly-button showing and gun belt down around his knees.

Bangor should do something about sloppy police officers.

J. Dun

Policeman sues NEWS

AUGUSTA (AP) - A Waterville police sergeant filed a \$3.3 million libel suit against the Bangor Daily News Tuesday, claiming an editorial that said he was too overweight to be effective caused "mental anguish" and damaged his reputation.

The suit was filed in Kennebec County Superior Court on behalf of Sgt. Clinton Caron, a 20-year police veteran.

It asks for \$3 million in punitive damages and \$300,000 for the "distress of mind and mental anguish" and "other injuries to (Caron's) reputation."

Daily News Managing Editor Paul Reynolds said the editorial "was a general statement on the need for police officers to be in good physical shape."

The August 28th editorial, titled "Obesity in the Ranks," appeared three days after Caron had been pictured on the front page of the News in a photo of a Waterville murder scene.

The editorial did not mention Caron by name but referred to a Waterville sergeant who "appears, in all his rotundity," in a "photo of a Waterville street slaying." It said the sergeant "makes Jackie Gleason look diminutive."

He "may be the most dedicated cop in Maine, he may know his stuff, he is in all probability someone's loved one, but by any reasonable standard, he carries too much mass to be either an effective cop on the beat or a tribute to his uniform," the editorial said.

The complaint says the charges constitute "false, malicious, improper and unlawful libel" that the Daily News "knew, or

should have known" was untrue. —

Waterville attorney Burton Shiro said the editorial statements "exceed by far what would be considered fair comment or fair criticism."

STATE OF MAINE

KENNEBEC, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-82-581

CLINTON P. CARON

Plaintiff

vs.

BANGOR PUBLISHING COMPANY)

Defendant)

)
)
)
) NOTICE TO TAKE ORAL
) DISCOVERY DEPOSITION
)

TO: Bernard J. Kubetz, Esq.

P.O. Box 1210

Bangor, Maine 04401

Please take notice that at 9:30 a.m., on Tuesday, July 19, 1983 at the law offices of BURTON G. SHIRO, 86 Silver Street, Waterville Maine, the Plaintiff in the above-entitled matter will take the deposition of V. Paul Reynolds, upon oral examination for discovery only, pursuant to the Maine Rules of Civil Procedure, before RUTH DENNETT, Official Court Reporter, or before some other officer authorized by law to administer oaths. This oral discovery will

continue from day to day until completed.

You are invited to attend.

Dated: June 17, 1983

BURTON G. SHIRO LAW OFFICES

By: s/Charles E. Trainor
Attorney for Plaintiff
86 Silver Street
Waterville, Maine 04901

STATE OF MAINE

KENNEBEC, SS.

SUPERIOR COURT
Civil Action
Docket No. CV-82-581

CLINTON P. CARON,

Plaintiff

Vs.

BANGOR PUBLISHING COMPANY,

Defendant

)
)
)
)
) AFFIDAVIT OF CLINTON
)
) P. CARON
)
)

CLINTON P. CARON, being first duly sworn, hereby deposes and says that:

1. I am Clinton P. Caron and I am the Plaintiff in the above entitled action. I make this Affidavit in opposition to Defendant's Motion for Summary Judgment. I was deposed by the Defendant on May 12, 1983.
2. On August 25 and August 28 and 29, 1982, I was and still am a sergeant in the Waterville, Maine police department.
3. I am the Waterville "city cop" and

"sergeant" referred to in the article and editorial entitled, "Obesity in the Ranks", that appeared in the August 28-29, 1982 edition of the Defendant's newspaper and which is the subject of this action and I am further depicted "in an Associated Press photo of the Waterville street slaying" that appeared on the front page of Defendant's newspaper in the August 25, 1982 edition.

4. The statements made about me in the said article and editorial in question are false and malicious. I do not make "Jackie Gleason look diminutive". I do not carry and have not ever carried "too much mass to be either an effective cop on the beat or a tribute to [my] uniform". I am not a "cop on the beat" and was not a "cop on the beat" on either August 25, 28 or 29, 1982 or thereabouts. I have always been and still am an effective police officer and a tribute to my uniform.

5. No representative, agent or employee of Defendant's newspaper ever contacted me or my family about the said article and editorial in question either prior to or subsequent to its publication.
6. I am the object of the "editorial writer's frustration" referred to in the sixth paragraph of the said article and editorial in question.
7. A policeman is not expected "to be able to run at least as fast as a felon" and felons are not "invariably nimble of foot and as lean as Bill Rogers".
8. I do and did know my "stuff" and I perform and have always performed my job well, and have received much training and education concerning my job.
9. I have and had many people who love me.
10. I vehemently aver that the facts expressed by Defendant in its said article

and editorial dated August 28-29, 1982 and referring to me as being an ineffective police officer and not a tribute to my uniform are false, untrue, malicious, humiliating and extremely defamatory.

11. A deposition of V. Paul Reynolds, the author of the said article and editorial in question, has been scheduled for July 19, 1983. I therefore reasonably expect to be able to present more facts essential to the Court justifying my opposition to Defendant's Motion for Summary Judgment.

IN WITNESS WHEREOF, the undersigned, Clinton P. Caron, hereunto sets his hand and seal this 13th day of June, 1983.

Clinton P. Caron

STATE OF MAINE

KENNEBEC, SS.

June 13, 1983

Personally appeared the above-named Clinton
P. Caron and made oath to the foregoing by
him subscribed.

Before me,

s/Louis J. Shiro
Notary Public

No. 83-1681

Office - Supreme Court, U.S.

FILED

MAY 17 1984

ALEXANDER L. STEVAS.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CLINTON P. CARON,

Petitioner,

v.

BANGOR PUBLISHING COMPANY,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Judicial Court of Maine

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD REVIEW THE HOLDING OF THE SUPREME JUDICIAL COURT OF MAINE THAT THE ARTICLE IN QUESTION CONSTITUTED AN EXPRESSION OF OPINION BASED ON NON-DEFAMATORY STATED FACTS AND WAS THEREFORE PRIVILEGED AS A MATTER OF STATE LAW.

* In accordance with Supreme Court Rule 28.1, please be advised that the parties appearing below were the Bangor Publishing Company and Clinton P. Caron.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

CLINTON P. CARON,

Petitioner,

v.

BANGOR PUBLISHING COMPANY,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Judicial Court of Maine

RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine, issued January 17, 1984, is set forth at pages 20-32 of the Petition for Certiorari. The opinion is published in the Atlantic Reporter at 470 A.2d 782 (Me. 1984).

COUNTERSTATEMENT OF THE CASE

On August 28, 1982, the Bangor Publishing Company published an editorial in the Bangor Daily News entitled "Obesity in the Ranks." The editorial set forth the writer's opinion that "physical conditioning is, or should be, a condition of employment for those responsible for public safety and law and order." To illustrate this point, the editorial makes reference to an Associated Press photograph, published several days earlier in the Bangor Daily News, which depicts an obviously

overweight police officer at a Waterville, Maine crime scene. The police officer was not identified by name in either the editorial or in the caption to the photograph, although the editorial and caption disclosed that the person described was a member of the Waterville, Maine Police Department.

Clinton P. Caron then brought a libel suit, alleging that he was the police sergeant referred to in the editorial, and sought \$3.3 million in compensatory and punitive damages. The Bangor Publishing Company responded to the Complaint by raising four affirmative defenses: the statements complained of are protected under the First Amendment of the United States Constitution and Article 1, Section 4 of the Maine Constitution; the editorial represents a protected statement of opinion under those same state and federal constitutional provisions; Clinton Caron, as a public official, cannot sustain his burden of proving actual malice; and the statements complained of were, in fact, true and therefore protected under 14 M.R.S.A. § 152.

Mr. Caron's Complaint was filed on December 7, 1982. Bangor Publishing Company filed its Motion for Summary Judgment on May 19, 1983. The Motion was scheduled for hearing on June 24, 1983, roughly six and one-half months after the Complaint was filed. During that six and one-half month period, the Bangor Publishing Company filed interrogatories and took the depositions of Plaintiff and the Chief of Police of the Waterville Police Department. Four days before the hearing Mr. Caron noticed the deposition of Mr. Reynolds, the editorial author, for mid-July, 1983. At no time did Mr. Caron move to continue the summary judgment hearing. At the June 24, 1983 hearing Mr. Caron's counsel orally suggested, for the first time, that the hearing should be delayed so that depositions could first be taken of the editorial writer and publisher to probe into their respective states of mind in connection with the editorial.

The Motion for Summary Judgment was granted, the trial court ruling that the editorial represented a non-actionable statement of opinion. The Maine Supreme Judicial Court affirmed, holding the editorial to be a protected expression of opinion based on disclosed non-defamatory facts.

REASONS FOR DENYING THE WRIT

THE SUPREME JUDICIAL COURT OF MAINE CORRECTLY HELD THAT THE ARTICLE IN QUESTION CONSTITUTED AN EXPRESSION OF OPINION BASED ON NON-DEFAMATORY DISCLOSED FACTS AND WAS THEREFORE PRIVILEGED AS A MATTER OF STATE LAW.

In affirming the Summary Judgment below, the Supreme Judicial Court of Maine exercised its jurisdiction to resolve an important question of first impression in the State of Maine. The court correctly concluded that expressions of opinion based upon disclosed non-defamatory facts are privileged as a matter of law. In reaching this decision the court reviewed the extensive common law history of the opinion privilege as manifested in the decisions of other state courts and the Restatement (Second) of Torts. The court below similarly recognized the constitutional implications inherent in protecting expressions of opinion as discussed in prior cases decided by this Court.

This Court has observed that its primary concern in public official libel cases is the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . ." *New York Times Co. v. Sullivan*, 376 U.S. 264, 270. Recognition of the fact that effective discussion about the operations of government may consist of severe, sarcastic and satirical criticism of public servants requires that trial courts weigh very carefully what is libelous and what is not. These principles were recently reaffirmed in *Bose Corp. v. Consumer Union of the United States*, 52 U.S.L.W. 4513 (U.S. April 30, 1984). The "'requirements for actionable libel are strict in the interests of protecting freedom of expression'". *Byars v. Kolodziej*, 363 N.E. 2d 628, 630 (Ill. App. Ct. 1977) (citation omitted).

Thus, in public official or public figure libel cases, "before the test of reckless or knowing falsity can be met, there must be a false statement of fact." *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974).

The expression of pure opinion—that is, an “assertion that cannot be proved false . . . cannot be held libelous.” *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977). Similarly, the use of “loose language or undefined slogans that are part of conventional give-and-take in our economic and political controversies . . . is not to falsify facts.” *Cafeteria Employees Local 302 v. Angeios*, 320 U.S. 293, 295 (1943), quoted in *National Association of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974).

While the distinction between a statement of fact and an expression of opinion is often blurred, *see, e.g., Buckley v. Littell*, 539 F.2d 882, 893-95 (2d Cir.), *cert. denied*, 429 U.S. 1062 (1977), several factors demonstrate that the statement at issue was one of opinion.

The material published was prominently identified as an editorial. The editorial was “written from a subjective, rather obvious, point of view and did not purport to be anything else.” *Rinaldi v. Holt, Rinehard & Winston, Inc.* 2 Med. L.Rptr. 2169, 2175 (N.Y. Ct. App. 1977). It took a strong editorial opinion on a significant local issue.¹

The editorial in this case expressed the writer's view that “physical conditioning is, or should be, a condition of employment for those responsible for public safety and law and order.”

¹ Numerous Courts have given wide berth to the use of critical commentary on public figures and public officials. Cases have held nonactionable the words “blackmail”, *Greenbelt Cooperative Publishing Ass'n, v. Bressler*, 398 U.S. 6 (1970); “traitor”, *National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); “bastard”, *Curtis Publishing Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966); “destroyed”, *Times v. Johnston*, 448 F.2d 378 (4th Cir. 1971); “liar”, *Wade v. Sterling Gazette Co.*, 56 Ill. App. 2d 101 (3rd District, 1965); “dishonorable and deluded”, *Delis v. Sepis*, 9 Ill. App. 3d 317 (Ill. App. 1972); “nut” and “screwball”, *Skolnick v. Nudelman*, 95 Ill. App. 2d 293, 237 N.E. 2d 804 (Ill. App. 1968); “completely loses his cool, turns purple ***Prussian dictator”, *Vola Solbrig v. Licata*, 15 Ill. App. 3d 1025, 305 N.E. 2d 252 (Ill. App. 1973); “deceptive individual”, *Craig v. Moore*, 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. 1978); “fascist”, *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); “lousy agent”, *Valentine v. North American Co. For Life and Health Insurance*, 16 Ill. App. 3d 277, 305 N.E.2d 746, *aff'd*, 60 Ill.2d 168, 328 N.E. 2d 265 (1973); and “manipulator” and “exploiter”, *Hotchner v. Castillo-Pusche*, 551 F.2d 910 (2d Cir. 1977).

The author specifically references his opinion by pointing to the recent Associated Press photograph of a Waterville murder scene which depicts an overweight police officer, now known to be the Petitioner, Clinton P. Caron. The editorial writer referred to the policeman as "appearing in all his rotundity in an Associated Press photo" and as making "Jackie Gleason look diminutive." An officer's physique, according to the writer, is likely to inhibit his ability to engage in a foot race with a fleeing felon "who is invariably nimble of foot and as lean as Bill Rogers." Although this policeman, identified by reference to the photo and his status as a sergeant in the Waterville Police Department, may be "dedicated, knowledgeable and loved," the author opines that "he carries too much mass to be either an effective cop on the beat or a tribute to his uniform."

All of these challenged statements must be viewed as the writer's convictions concerning a topic of legitimate public concern—physically unfit policemen. Indeed, how could such a characterization be proven true or false and how could a newspaper's readership, or for that matter the courts, agree on what evidence would support or refute such a contention. The author admittedly used colorful metaphors, hyperbole and overstatement in pointing out the undisputed truthful fact that the officer was overweight. The writer resorts, however, to a dignified tone in expressing his opinion that the police officer's mass prevents him from being optimally effective. A reading of the editorial compels the recognition that the author was not purporting to factually analyze this policeman's job qualifications other than to express an opinion, based solely on the photographic depiction.

All references to Petitioner in the editorial constitute expressions of opinion, rather than statements of fact, concerning his fitness for public office. Such opinions, as a matter of law, cannot be said to be libelous, and were properly disposed of on summary judgment.

The Supreme Judicial Court of Maine correctly recognized in its holding that:

Because the editorial is an expression of opinion based on disclosed nondefamatory facts, and cannot

reasonably be construed to imply undisclosed defamatory facts, the Superior Court properly granted the defendants Motion for Summary Judgment.

Petition for Cert. at 32.

In reaching this conclusion, the court exercised its jurisdiction to resolve an important legal issue of first impression in the State of Maine. In holding that expressions of opinion based on disclosed truthful facts do not give rise to liability, the court looked to persuasive authority from other state courts and to the Restatement (Second) of Torts.²

Additionally, the Supreme Judicial Court of Maine reviewed the relevant decisions by this Court concerning protections for statements of opinion in libel cases. *National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Association v. Bressler*, 398 U.S. 6 (1970); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); accord *Bose Corp. v. Consumer Union of the United States*, 52 U.S.L.W. at 4518. The holding of the court below is entirely consistent with the prior holdings and expressions in

² The court below held as follows: "The determination whether an allegedly defamatory statement is a statement of fact or opinion is a question of law. See *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976); *Pease v. Telegraph Publishing Co.*, 121 N.H. 62, 426 A.2d 463 (1981); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 397 N.Y.S. 2d 943, 42 N.Y. 2d 369, 366 N.E. 2d 1299 (N.Y. Ct. App. 1977), cert. denied, 434 U.S. 969 (1977); *Cole v. Westinghouse Broadcasting Co.*, 386 Mass. 303, 435 N.E. 2d 1021 (1982). If the average reader could reasonably understand the statement as either fact or opinion, the question of which it is will be submitted to the jury. E.g., *Good Government Group v. Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258, 586 P.2d 572 (1978), cert. denied, 441 U.S. 961 (1979); *Pease v. Telegraph Publishing Co.*, supra; *Myers v. Boston Magazine Co.*, 380 Mass. 336, 403 N.E. 2d 376 (1980). If, however, the court concludes that the average reader could not reasonably understand the statement as anything other than opinion, no genuine issue of material fact exists and summary judgment for the defendant in the libel action may be entered. Such is the situation here.

• • •

A statement, ostensibly in the form of an opinion, gives rise to liability if it implies the allegation of undisclosed defamatory facts as the basis of the opinion. See Restatement (Second) of Torts § 566 (1977).

dicta in the cases cited above. In turn, the views of this Court with respect to the constitutional protections for statements of opinion are fully consistent with, and are based on the extensive common law tradition of protection for statements of opinion.³

Finally, Petitioner complains that he should have been allowed to depose the publisher in an effort to establish actual malice. This argument is without merit for two reasons. First, when a publication is privileged, as is the one in question, the issue of actual malice need never be reached. Second, the record reflects that the Petitioner had six and one-half months to conduct depositions yet failed to do so. The Petitioner was dilatorious and cannot now complain that he was denied his right to discovery.

³ See R. SACK, *LIBEL, SLANDER AND RELATED PROBLEMS* 153-85 (1980)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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